INDEX OF ADDENDA

ADDENDUM A

STATE OF MICHIGAN

COURT OF APPEALS

MARGARET GAINFORTH, Personal Representative of the ESTATE OF FELICE VERMEERSCH,[1]

Plaintiff-Appellee,

v

BAY HEALTH CARE d/b/a BAY DIAGNOSTIC CENTER FOR WOMEN, BAY REGIONAL MEDICAL CENTER f/k/a BAY HEALTH SYSTEMS and BAY MEDICAL CENTER, INC., BAY RADIOLOGICAL CONSULTANTS, P.C., T. K. JONES, M.D., HARPAL SINGH, M.D., and HARPAL SINGH, M.D., P.C.,

Defendants-Appellants.

UNPUBLISHED
August 11, 2005

No. 260054
Bay Circuit Court
LC No. 02-003940-NH

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendants Bay Health Care, Bay Regional Medical Center, Bay Radiological Consultants, Dr. TK Jones, and Dr. Harpal Singh and his private corporation, appeal by leave granted the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that the medical malpractice wrongful death suit, filed on behalf of the estate of Felice Vermeersch, was time-barred. We reverse.

I. Facts and Procedural History

Dr. Singh had been the decedent's primary care physician since the mid-1980s. On October 20, 1997, Dr. Singh referred her to Bay Diagnostic Center for Women for a mammogram. The mammogram revealed a "vague density in the upper outer quadrant of the right breast." Based on this finding, magnification compression spot films were also taken. Dr.

[1] For ease of reference, we will refer to Margaret Gainforth, in her capacity as personal representative acting on behalf of the plaintiff estate, as the individual plaintiff.

Jones interpreted these tests on October 22, 1997, and ruled out breast cancer.[2] However, in July of 1999, Felice Vermeersch was diagnosed with breast cancer when a palpable tumor was discovered in her right breast.[3] The tumor had already metastasized to her liver and lymph nodes. She died on September 11, 1999, from complications of this cancer.[4]

Letters of authority naming Margaret Gainforth as personal representative of the decedent's estate were issued on June 6, 2000. These letters expired a year later and new letters were issued on June 18, 2001. Pursuant to MCL 600.2912b,[5] plaintiff issued to defendants a written notice of intent to file a claim for medical malpractice on May 17, 2002. Plaintiff filed the complaint on behalf of the estate on October 25, 2002, 189 days later.

On November 4, 2004, defendants moved for summary disposition under MCR 2.116(C)(7), asserting that the statute of limitations barred plaintiff's claims. Specifically, defendants contended that plaintiff failed to bring the claims within either the statute of limitations or the allowable timeframe in the saving provision of MCL 600.5852.[6] Defendants argued that, as plaintiff failed to file the notice of intent during the two-year statute of limitations for malpractice claims,[7] the limitations period was not tolled pursuant to the recent Michigan

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[2] Dr. Jones' October 22, 1997 interpretation of the decedent's mammogram and films is the basis of the malpractice claims against Dr. Jones and the defendant medical centers and organizations.

[3] Plaintiff alleged that the tumor could have been discovered earlier by Dr. Singh if he had conducted a breast examination. The decedent's medical records indicated that he had not conducted a breast examination on her since 1987.

[4] Plaintiff contends, and defendants concede, that Dr. Singh's alleged malpractice continued until the decedent's death.

[5] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

[6] MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

[7] MCL 600.5805(6). At the time plaintiff filed the complaint, the relevant subsection was located at MCL 600.5805(5).

Supreme Court decision in *Waltz v Wyse*.[8] Furthermore, pursuant to *Waltz*, the saving provision was not a "statute of limitations or repose" that could be tolled by filing a notice of intent.[9] As plaintiff filed the claims more than two years after the original letters of authority were issued, defendants contended that the claims were time-barred. Relying on *Omelenchuk v City of Warren*,[10] plaintiff contends that, at the time she filed the complaint on behalf of the estate, filing the notice of intent tolled the saving period for 182 days pursuant to MCL 600.5856[11] and, therefore, the complaint was filed well within the allowable period.

The trial court denied defendants' motion. The court noted that the Supreme Court had rejected plaintiff's position in *Waltz v Wyse*. However, *Waltz* was decided more than a year after the complaint was filed. The court found that *Waltz* was "a change in everyone's perspective of what the law was" and, therefore, should not apply retroactively. The trial court applied *Omelenchuk* to find that the saving period was tolled and, therefore, plaintiff's claims could be raised beyond the three-year ceiling. The court also determined that the saving period did not begin to run until the second letters of authority were issued. Accordingly, the trial court found plaintiff's claims to be timely and denied defendants' motion for summary disposition. We subsequently granted defendants leave to appeal.[12]

II. Timeliness of Plaintiff's Complaint

We review a trial court's determination regarding a motion for summary disposition de novo.[13] We also review de novo a trial court's determination regarding the timeliness of a claim.[14]

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[8] *Waltz v Wyse*, 469 Mich 642; 671 NW2d 813 (2004).

[9] *Id.* at 649-650, citing *Miller v Mercy Memorial Hosp*, 466 Mich 196; 644 NW2d 730 (2002), and *Lindsey v Harper Hosp*, 455 Mich 56, 60-61; 564 NW2d 861 (1997).

[10] *Omelenchuk v City of Warren*, 461 Mich 567, 577; 609 NW2d 177 (2000).

[11] MCL 600.5856 provides:

> The statute of limitations or repose are tolled in any of the following circumstances:
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

At the time plaintiff filed the complaint, the relevant subsection was located at MCL 600.5856(d).

[12] *Gainforth v Bay Health Care*, unpublished order of the Court of Appeals, entered February 23, 2005 (Docket No. 260054).

[13] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A. Retroactive Application of *Waltz v Wyse*

Defendants first challenge the trial court's determination that *Waltz* could only be applied prospectively and, therefore, did not apply to plaintiff's claims. The trial court agreed with plaintiff that *Waltz* significantly altered the general perception regarding the filing of medical malpractice claims and, therefore, determined that it could only be applied prospectively.

In *Omelenchuk*, the plaintiffs were appointed as copersonal representatives of the decedent's estate on February 14, 1994, one day after the decedent's death. The Court found that "if no tolling provision were applicable, the personal representatives had until February 14, 1996—two years after their appointment—to bring the action" under MCL 600.5852.[15] The limitation period was tolled in *Omelenchuk* for 182 days when the plaintiffs filed the notice of intent during the statutory period.[16] However, the Court did not refer to the tolling of the two-year statute of limitations, which expired on February 13, 1996. Rather, the Court continually referred to the tolling of the period set to expire on February 14, 1996, the saving period.

In *Waltz*, the Supreme Court admitted that any confusion regarding the interpretation of those statutes affecting the filing of medical malpractice claims was caused by its use of imprecise language and mistaken time calculations in *Omelenchuk*.[17] The Court then held that the saving provision in MCL 600.5852 is not a statute of limitations or repose that can be tolled by the notice provision in MCL 600.5856.[18] Although the Michigan Supreme Court admitted its fault in causing this confusion, both the Supreme Court and this Court have applied *Waltz* retroactively.[19] We are bound by those decisions and, therefore, are compelled to apply *Waltz* in this case.[20]

B. Application of *Waltz* to Plaintiff's Claims

It is undisputed that plaintiff did not file the medical malpractice claims within the two-year malpractice statute of limitations in MCL 600.5805(6). The statute of limitations expired on the claims against Dr. Singh on September 11, 2001, and against the remaining defendants on

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(...continued)

[14] *Farley v Advanced Cardiovascular Health Specialists, PC*, ___ Mich App ___; ___ NW2d ___ (2005), slip op at 4.

[15] *Omelenchuk, supra* at 569.

[16] *Id.* at 577.

[17] *Waltz, supra* at 653-655.

[18] *Id.* at 649-650.

[19] *Forsyth v Hopper*, 472 Mich 929 (2005); *Wyatt v Oakwood Hosp & Medical Ctrs*, 472 Mich 929 (2005); *Farley, supra* at 6; *Ousley v McLaren*, 264 Mich App 486, 494-495; 691 NW2d 817 (2004). But cf *Chernoff v Sinai Hosp of Greater Detroit*, 471 Mich 910 (2004) (denying leave to appeal even though the complaint was filed two years after the expiration of the statute of limitations and five months after the expiration of the saving period).

[20] *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004), citing MCR 7.215(I)(1); *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987).

October 22, 1999. If a plaintiff files a notice of intent to sue within the two-year statute of limitations, however, the limitations period is tolled.[21] Plaintiff did not issue the notice of intent to defendants until May 17, 2002, nearly a year after the later statute of limitations had expired. Accordingly, the statute of limitations was not tolled.

However, as the decedent died before these limitation periods expired, plaintiff, as her personal representative, could file the claims within two years of the issuance of letters of authority pursuant to the saving provision of MCL 600.5852. Defendants contend that this saving period expired on June 6, 2002, two years after the first letters of authority were issued. The trial court, relying on *Eggleston v Bio-Medical Applications of Detroit, Inc*,[22] found that the saving period did not expire until June 18, 2003, two years after the issuance of the second letters of authority.

In *Eggleston*, the decedent's husband was appointed as temporary personal representative and was issued letters of authority on April 4, 1997. He died four months later. The plaintiff, decedent's son, was appointed as successor personal representative and letters of authority were issued to him on December 8, 1998. The plaintiff filed the complaint on behalf of the estate alleging medical malpractice on June 9, 1999.[23] This Court found that the saving period began to run when the letters of authority were issued to the first personal representative. The Supreme Court reversed, finding as follows:

> Although the Court of Appeals purported to construe and apply the plain language of MCL 600.5852, the Court misquoted the statute by inserting "the" before "letters of authority."
>
> "If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after [the] letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run."
>
> The Court relied on this misquotation in holding that a personal representative must bring an action within two years after the initial letters of authority are issued to the first personal representative. This is not, however, what the statute says. The statute simply provides that an action may be commenced by the personal representative "at any time within 2 years after letters of authority are issued although the period of limitations has run." The language adopted by the Legislature clearly allows an action to be brought within two years after letters of

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[21] MCL 600.5856(c); *Waltz*, *supra* at 651.

[22] *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).

[23] *Id.* at 31.

> authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.[24]

This case is distinguishable from *Eggleston*. Plaintiff was *the* personal representative appointed to the decedent's estate. Although subsequent letters of authority were issued to plaintiff, these letters merely continued plaintiff's term as *the* personal representative. Granting the plaintiff in *Eggleston* two years from his appointment as successor personal representative allowed him two full years to file his complaint. In this case, allowing the saving period to run from the issuance of the second letters of authority grants plaintiff an additional year beyond the statutory saving period in which to file the complaint. Plaintiff had until the two-year anniversary of the issuance of the letters of authority to file the malpractice claims. This two-year savings period expired on June 6, 2002, more than four months before plaintiff filed the complaint. Accordingly, the complaint was not timely filed within either the statute of limitations or within the two-year period provided by the saving provision.[25]

Furthermore, the claims against Bay Health Care, Bay Regional Medical Center, Bay Radiological Consultants, and Dr. Jones were filed three days after the expiration of the three-year ceiling provided in MCL 600.5852. This ceiling is also not tolled by filing a notice of intent.[26] Therefore, the complaint was not filed within the statutory timeframe by any means. Accordingly, we must reverse the trial court's denial of defendants' motion for summary disposition as plaintiff's claims were time-barred.

C. Plaintiff's Alternate Theories

Although we have determined that plaintiff's claims were untimely based upon the Michigan Supreme Court's interpretation of the notice tolling provisions in *Waltz*, plaintiff contends that we should not reverse the trial court's order denying defendants' motion for summary disposition. Plaintiff notes that she challenged defendants' motion on several grounds that the trial court did not address and argues that these grounds should be reviewed first by the trial court. However, plaintiff cannot succeed on these grounds as a matter of law.

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[24] *Id.* at 32-33 (citations omitted).

[25] Plaintiff also relies on *Chernoff v Sinai Hosp of Greater Detroit*, unpublished opinion of the Court of Appeals, issued March 22, 2002 (Docket No. 228014). However, that case has no precedential value and is equally inapplicable to these circumstances. In that case, the personal representative filed the notice of intent and complaint after her appointment as personal representative had expired. *Id.* at 1. The probate court subsequently reinstated the letters of authority. *Id.* at 2. This Court held that the reinstatement related back to the filing of the complaint, which was timely filed pursuant to *Omelenchuk*. In this case, plaintiff's authority to file suit only lapsed for twelve days and plaintiff took no action during that time.

[26] *Waltz*, *supra* at 651. In *Waltz*, it appears that the Supreme Court would potentially allow a personal representative five years plus 182 days to file a complaint if he or she issued the notice of intent within the statute of limitations. *Id.* at 652 n 14.

Plaintiff challenges the application of *Waltz* as it effectuated a change in the statute of limitations since the filing of the complaint. Plaintiff correctly argues that the Michigan Supreme Court has held that the statute of limitations in place at the time a plaintiff files a complaint controls an action without regard to intervening changes.[27] Both the Michigan Supreme Court and this Court have determined that *Waltz* should apply to cases filed before that decision was written.

Plaintiff similarly challenged the application of *Waltz* on due process grounds. Plaintiff argued that retroactive application would change the rules mid-suit, denying her the opportunity to file suit on behalf of the estate. However, the Michigan Supreme Court and this Court have repeatedly rejected constitutional challenges "based on the notion that the *Waltz* decision shortened the two-year wrongful death saving provision."[28]

Plaintiff also contends that the trial court could, in the interests of justice, exercise judicial, or equitable, tolling. This Court recently described equitable tolling as follows:

> "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff." 51 Am Jur 2d, Limitation of Actions, § 174, p 563. "In order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, provided it is in conjunction with the legislative scheme." 54 CJS, Limitations of Actions, § 86, p 122.[29]

Tolling the saving period for 182 days would prevent unfairness to plaintiff who filed the notice of intent with the good faith belief, based on *Omelenchuk*, that such tolling would occur under the statute. However, equitably tolling the saving period would be in direct contravention to those cases holding that *Waltz* is to be applied retroactively.

Finally, relying on *Bryant v Oakpointe Villa Nursing Centre, Inc*,[30] plaintiff asserts that the trial court must determine whether the claims sound in ordinary negligence, with a three-year statute of limitations,[31] rather than medical malpractice. To distinguish medical malpractice from ordinary negligence, a court must determine: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises

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[27] *Chase v Sabin*, 445 Mich 190, 192 n 2; 516 NW2d 60 (1994), citing *Winfrey v Farhat*, 382 Mich 380, 389-390; 170 NW2d 34 (1969).

[28] *Farley*, *supra* at 7 n 29, citing *Waltz*, *supra* at 652 n 14, and *Ousley*, *supra* at 496.

[29] *Ward v Rooney-Gandy*, 265 Mich App 515, 517; 696 NW2d 64 (2005).

[30] *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004).

[31] MCL 600.5805(10).

questions of medical judgment beyond the realm of common knowledge and experience."[32] However, plaintiff has failed to make any argument, either on appeal or in the lower court, to support her assertion that these claims could sound in ordinary negligence. Although we need not review a claim lacking legal and factual support,[33] we note that plaintiff's claims are very different than those presented in *Bryant*. In *Bryant*, the plaintiff's decedent died of asphyxiation when her head and neck became wedged in her bed rail.[34] In this case, plaintiff's allegations involve the failure to detect and diagnose breast cancer. The alleged malpractice in this case clearly occurred "within the course of a professional relationship" and could not be determined by a lay juror in his or her "common knowledge and experience."

Reversed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

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[32] *Bryant*, *supra* at 422.

[33] *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998) ("A party may not leave it to this Court to search for a factual basis to sustain or reject its position.").

[34] *Bryant*, *supra* at 417.

Appendix

10/22/1997	Date of alleged malpractice of Bay Health Care, Bay Regional Medical Center, Bay Radiological Consultants, and Dr. Jones
9/11/1999	Felice Vermeersch dies; Date of alleged malpractice of Dr. Singh
10/22/1999	Two-year statute of limitations, MCL 600.5805(6), expires on claims against Bay Health Care et al.
6/6/2000	Letters of authority issued to plaintiff
6/18/2001	Second letters of authority issued to plaintiff
9/11/2001	Two-year statute of limitations, MCL 600.5805(6), expires on claims against Dr. Singh
5/17/2001	Notice of intent issued, MCL 600.2912b
6/6/2002	Two-year wrongful death saving provision expires, MCL 600.5852
10/22/2002	Three-year ceiling in saving provision expires on claims against Bay Health Care et al, MCL 600.5852
10/25/2002	Complaint filed
6/18/2003	Two-year wrongful death saving provision expires IF based on second letters of authority, MCL 600.5852

ADDENDUM B

STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY KING, Personal Representative of the ESTATE OF ANDREW BAKER,

Plaintiff-Appellee,

v

MICHEAL BRIGGS, D.O., MERLE HUNTER, M.D., EMERGENCY PHYSICIANS MEDICAL GROUP, P.C., and MCPHERSON HOSPITAL, a/k/a TRINITY HEALTH-MICHIGAN,

Defendants-Appellants.

UNPUBLISHED
July 12, 2005

Nos. 259136 and 259229
Livingston Circuit Court
LC No. 04-020535-NH

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition. The motion had been brought on the ground that the statute of limitations in this medical malpractice action had expired. We reverse.

The first issue on appeal is whether the saving provision in MCL 600.5852, giving the personal representative two years from the issuances of letters of authority to file a malpractice claim, is tolled during the 182-day mandatory notice period required by MCL 600.2912b(1) before suit can be filed in a medical malpractice action.

Recently, the Michigan Supreme Court stated that MCL 600.5852 is a

> *saving* provision designed "to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions." *Lindsey* [*v Harper Hosp,* 455 Mich 56, 60-61, 65; 564 NW2d 861 (1997)]. It is not a "statute of limitations" or a "statute of repose." Thus, the notice tolling provision, [MCL 600.] 5856(d)[1] – which explicitly applies only to "the statute of limitations or repose" – does not operate to toll the additional period permitted

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[1] The applicable notice provision was renumbered by 2004 PA 87 to MCL 600.5856(c).

> under [MCL 600.]5852 for filing wrongful death actions. [*Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004).]

Hence, MCL 600.5852 is a saving statute that is not tolled during the 182-day notice period. In the present case, the statute of limitations began running on September 6, 2001, the date of the alleged malpractice. Letters of authority were issued on September 26, 2001. Notice of intent was sent on September 5, 2003, tolling the period of limitations with one day remaining. The period of limitations recommenced running after March 5, 2004. One day was added for the tolled period of limitations; because March 6, 2004 was a Saturday, the limitation period expired on March 8, 2004. MCR 1.108(1). The two-year saving provision pursuant to MCL 600.5852 expired on September 26, 2003, and could not be tolled. Therefore, the complaint filed on March 11, 2004, was not timely.

The second issue on appeal is whether a successor personal representative of the estate would have an additional two years from the date of his letters of authority to file suit under MCL 600.5852, which would result in a timely filed complaint. Under the circumstances of this case, the successor personal representative was not entitled to an additional two years.

Recently, in *Eggleston v Bio-Med Applications of Detroit, Inc,* 468 Mich 29; 658 NW2d 139 (2003), our Supreme Court examined a similar issue. In *Eggleston,* a temporary personal representative was appointed, but he died a short time after. *Id.* at 31. A successor personal representative was appointed, and he filed a malpractice claim. *Id.* The claim was brought within two years of the successor's appointment, but not within two years of the appointment of the temporary representative. *Id.* Our Supreme Court stated,

> The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative. [*Id.* at 33.]

However, the present case is distinguishable. Notably in *Eggleston,* the temporary personal representative never filed suit, while the predecessor personal representative in the instant case did. Thus, our Supreme Court did not have the occasion to address the issue facing this Court, which essentially is whether a personal representative who fails to diligently pursue a malpractice cause of action on behalf of an estate within the allotted time may nonetheless save the action from dismissal by substituting another personal representative. MCL 700.3613 states that a successor personal representative "must be substituted in all actions and proceedings in which the former personal representative was a party." The successor representative here must be substituted in the action already commenced and does not have an additional two years under MCL 600.5852 to pursue the malpractice claim.

The trial court improperly denied defendants' motion for summary disposition because the claim was not timely filed.

Reversed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

ADDENDUM C

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of PAULINE C. SHALL, Deceased.

PAT BIHLER, SHIRLEY HILL, ROY GREEN, and ROBERT GREEN,

Petitioners-Appellants/Cross-Appellees,

v

HELEN ROY,

Respondent,

and

FIRST OF AMERICA BANK PERSONAL REPRESENTATIVE, a/k/a NATIONAL CITY BANK,

Respondent-Appellee/Cross-Appellant.

UNPUBLISHED
April 29, 2003

No. 229857
Washtenaw Probate Court
LC No. 94-103862-IE

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Petitioners appeal as of right an order awarding respondent National City Bank attorney fees pursuant to MCL 600.861(1) and MCR 5.801(B)(1)(u). Respondent cross appeals the order, seeking additional attorney fees. We reverse the portion of the order awarding respondent attorney fees and affirm the portion of the order declining to award it additional attorney fees.

Pauline C. Shall passed away in 1994 and National City Bank, formerly known as First of America Bank, was appointed as personal representative of her estate pursuant to her will. The beneficiaries of the will, Mrs. Shall's four grandchildren, petitioned the probate court to remove the bank as personal representative and were successful. The bank then moved for reconsideration and was ultimately reinstated as personal representative. The probate court ordered the estate to pay the bank attorney fees, which were incurred in defending its removal.

It is well established that attorney fees incurred by a personal representative to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proven. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). In the present case, the bank voluntarily involved itself in a complicated situation regarding its capacity as personal representative and regarding a joint bank account held between the decedent and her sister, Helen Roy. Once the bank was removed as personal representative, it moved for reconsideration. Although the bank was ultimately successful in getting reinstated, it was improper to charge the estate with the expenses incurred by the bank in relitigating its position as personal representative after it had already been removed by the probate court. Because the bank engaged in wrongdoing, we find the probate court's award of attorney fees constituted an abuse of discretion.

The ownership of the joint bank account was contested because of the circumstances surrounding its formation. To determine ownership of the joint bank account, Mrs. Shall's heirs filed suit against Helen Roy.[1] The bank then unnecessarily stepped in and became a primary player in the litigation. This action was taken by the bank in its corporate capacity, not in its capacity as personal representative. Generally, we have held that "[a]ttorney fees are chargeable to the estate . . . only where the services of the attorney were on behalf of and beneficial to the estate." *In re Valentino Estate*, 128 Mich App 87, 94-95; 339 NW2d 698 (1983). Specifically seeking to exclude the joint bank account from the estate was detrimental to the estate and constituted wrongdoing.

The probate court attempted to allocate attorney fees in proportion to the bank's actions in its capacity as personal representative and its actions in its capacity as a corporate entity. However, the bank's actions became so intertwined that it would be impossible to allocate the attorney fees and expenses properly between the dual roles the bank was playing. See *In re Davis' Estate*, 312 Mich 258, 265; 20 NW2d 181 (1945), in which our Supreme Court ruled that where attorney fees were not incurred for the benefit of the estate, but were incurred by the personal representative in defending himself against charges of fraud and wrongdoing, it would be impossible to allocate the attorney fees and expenses properly between the personal representative as an individual, as trustee, and as administrator. We review an award of attorney fees for an abuse of discretion. *In Re Attorney Fees & Costs*, 233 Mich App 694; 593 NW2d 589 (1999). An abuse of discretion is found only in cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Any attempt to allocate attorney fees in an equitable form is an impossibility in light of the bank's inextricably intertwined role as corporate entity and personal representative. The line between the two roles was so indistinguishable as to render the probate court's effort to properly allocate attorney fees an abuse of discretion.

On cross appeal, respondent argues that the probate court abused its discretion when it did not order the estate to pay attorney fees incurred in determining the ownership of the joint bank account. MCL 700.3709 states:

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[1] It appears the bank also filed suit at or about the same time the heirs filed their petition.

> The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of, or to determine title to, property.

Although the bank argues that its actions in seeking to have the joint bank account excluded from the estate comply with this statute, we do not conclude that the bank's action of spearheading the lawsuit to exclude the bank account from the estate was "reasonably necessary for the management, protection, and preservation" of the estate. On the contrary, the issue of ownership of the joint bank account was already being litigated between the beneficiaries of the will and Helen Roy. Therefore, it was unnecessary for the bank to step in and involve itself in the determination of the ownership of the joint bank account.

We have held that "[a]n estate is benefitted by legal services that increase or preserve the size of the decedent's estate." *In re Prichard Estate*, 164 Mich App 82, 87; 416 NW2d 331 (1997). Here, the legal fees were incurred by the bank in an attempt to reduce the estate. Therefore, the probate court did not abuse its discretion in declining to charge the estate with attorney fees incurred in the determination of the ownership of the joint bank account.

Affirmed in part and reversed in part.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of PAULINE C. SHALL, Deceased.

PAT BIHLER, SHIRLEY HILL, ROY GREEN, and ROBERT GREEN,

Petitioners-Appellants/Cross-Appellees,

v

HELEN ROY,

Respondent,

and

FIRST OF AMERICA BANK PERSONAL REPRESENTATIVE, a/k/a NATIONAL CITY BANK,

Respondent-Appellee/Cross-Appellant.

UNPUBLISHED
April 29, 2003

No. 229857
Washtenaw Probate Court
LC No. 94-103862-IE

Before: O'Connell, P.J., and Griffin and Markey, JJ.

MARKEY, J. (concurring in part and dissenting in part),

As Mrs. Shall's personal representative, the bank must stand in her shoes. It was clearly Pauline Shall's intent that the bank account she shared jointly with her sister Mrs. Roy be left in its entirety upon her death to Mrs. Roy. The bank's actively pursuing Pauline Shall's obvious intentions were for the benefit of the estate, albeit, not financially. It is to the benefit of the estate that the testator's intentions be effectuated. The case law cited in the majority opinion certainly supports this conclusion. Moreover, the fact that there was already an action instituted between Mrs. Roy and other heirs as to the ownership of the bank account does not necessarily mean that it was either unnecessary or improper for the bank as Mrs. Shall's personal representative to also attempt to clarify the matter. Indeed it is the personal representative's duty

to pursue the testator's intentions, and MCL 700.3709 specifically provides that the personal representative may maintain an action to determine the title to property. In other words, I believe that the trial court abused its discretion by failing to recognize that it was the personal representative's responsibility to pursue the proper ownership of the jointly held bank account whereas for Mrs. Roy, it was simply a voluntary action for her to institute the litigation. Consequently, I find it antithetical for the majority to conclude that pursuing the intentions of a testator are deemed "contrary to the interest of the estate" simply because doing so would involve removing a bank account from the estate res.

For these reasons, I believe that the trial court abused its discretion in failing to award attorney fees to the bank while serving as personal representative in its pursuit to ascertain the proper owner of the jointly held bank account. I join the majority in respect to the balance of its conclusions.

/s/ Jane E. Markey